No. 95-5841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. WHREN, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. May courts invoke the Fourth Amendment to transform police regulations into constitutional rights?

2. Should the exclusionary rule be extended to cover allegedly pretextual searches?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the continued safe operation of two useful institutions. The stop and frisk doctrine represents a crucial balancing of private and societal interests. It preserves individual rights, while giving police the necessary flexibility to deal with our volatile streets and highways. Police regulations help society by making police forces more efficient, focused, and professional.

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1. CJLF has written consent of both parties to file this brief.

Petitioners' argument, if accepted, would undermine these two beneficial practices. Their proposed "reasonable officer" standard for allegedly pretextual stops is too vague for officers to apply in the field. Requiring police regulations to guide this standard will undermine them. The threat to these institutions posed by petitioners' proposal is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On June 10, 1993, several District of Columbia undercover vice officers were patrolling for drug activity in Southeast Washington in two unmarked cars. *United States* v. *Whren*, 53 F. 3d 371, 372 (D. C. Cir. 1995). One of the cars contained Officers Efrain Soto, Jr. and Homer Littlejohn, and Investigator Tony Howard. *Ibid.*

At the suppression motion, Officer Soto testified that as his car turned left off of 37th Place north onto Ely Place, "he noticed a dark colored Nissan Pathfinder with temporary tags at the stop sign on 37th Place." *Ibid.* Soto observed the driver, Brown, looking into the lap of Whren, his passenger. At least one car was stopped behind the Pathfinder. As Soto's vehicle slowly proceeded onto 37th Place, he noticed that the Pathfinder was stopped at the intersection for over 20 seconds, obstructing traffic. As the officers started to tail the vehicle, it " 'sped off quickly' " at an " 'unreasonable speed.' " *Ibid.*

The officers followed the Pathfinder until it stopped at the intersection of Ely and Minnesota Avenue, where it was surrounded by several cars. Officers Soto and Littlejohn approached defendants' car and told Brown to put it in park. *Id.*, at 372-373. As he was speaking, Officer Soto noticed that Whren was holding a large, clear plastic bag containing what appeared to be cocaine base in each hand. *Id.*, at 373. Soto then managed to seize one of the bags from Whren, in spite of an attempt to hide the bags. Many more officers then arrived on the scene, arresting both defendants and searching the Pathfinder. The search of the vehicle recovered marijuana laced with PCP and crack cocaine. *Ibid.*

In response to questioning from defense counsel, Officer Soto denied making the stop because defendants fit a racial profile. *Ibid.* Soto testified that he had not intended to give a ticket to the driver, but instead stopped the Pathfinder "to inquire why it was obstructing traffic and why it sped off without signalling in a school area." *Ibid.* The District Court denied defendants' suppression motion, and defendants were each convicted on four counts of federal drug charges. *Ibid.* The Court of Appeals for the D. C. Circuit upheld the stop and subsequent search. *Id.*, at 376.

SUMMARY OF ARGUMENT

Reasonableness is only the starting point in any Fourth Amendment inquiry. Because of the Fourth Amendment's great scope, and the high price its enforcement exacts through the exclusionary rule, this Court must be very careful when it determines what is reasonable.

An important component of reasonableness is the principle of objectivity. This principle dictates that the propriety of a search or seizure does not turn on an officer's motive. This objectivity aids reviewing courts in giving the necessary neutral scrutiny of the officer's actions under the particular facts of the case.

Petitioners' proposed standard for allegedly pretextual searches is an unreasonably costly attempt for objectivity. Asking what a reasonable officer would do places great pressure on officers conducting stops. An unadorned reasonable officer standard does not provide enough guidance for the officer in the field. This problem is particularly acute because of the contradiction created by petitioners' proposed standard: telling an officer that a legally authorized stop is nonetheless illegal is inherently confusing.

Petitioners' use of police rules to determine what a reasonable officer would do is unacceptable. Police departments do not promulgate rules in order to protect the rights of citizens. Efficiency and officer safety are much more likely motivations for police rules. The fact that protecting individual rights is only

incidental to their purpose makes police rules unsuited for this role that petitioners would force upon them.

Elevating police rules to constitutional rights both distorts and discourages those rules. Petitioners would give the rules greater sanction than their creators intended. This distortion can only discourage police agencies from making rules out of fear of having these rules used against their departments in court. This Court recognized this concern in *United States* v. *Ceccolini*, 435 U. S. 268 (1978), where Internal Revenue Service rules were not given the sanction of the exclusionary rule due to this Court's fear that such an action would discourage agencies from promulgating rules.

The perversity of elevating administrative acts that benefit individuals into constitutional rights is also shown by prisoner rights cases. Starting with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court would elevate state-created benefits for prisoners into constitutional rights if administrators had less discretion in administering the benefits. This had the unintended effect of discouraging useful prison regulations. This Court abandoned this mode of analysis in *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) to avoid this unintended consequence.

Petitioners' reliance on police rules would also create a more subtle disincentive to burden these rules. The border between constitutional and unconstitutional under *Terry* v. *Ohio*, 392 U. S. 1 (1968) is necessarily murky. In order to minimize the risk of liability from violating the Fourth Amendment, prudent police departments may use regulations to draw a line of permissible conduct that clearly falls short of *Terry*'s border. Raising police rules to constitutional mandates makes this practice impossible. Petitioners' proposed standard would create a ratcheting effect. The rules would be turned into constitutional rights, placing them at the murky constitutional border. Any effort to avoid the risk of allowing officers to operate on the constitutional edge will be unsuccessful since attempts to create new, stricter regulations will lead to courts adopting the new regulations as the constitutional standard.

Another problem with using police rules as constitutional standards is the risk of judicial micromanagement of police

departments. Since petitioners' proposal is likely to lead to far fewer police regulations, courts applying this standard will face a regulatory void. The likely response to this situation will be judicial involvement in police rulemaking. Considerations of federalism, separation of powers, and the history of the prisoner rights cases all counsel against this development.

The exclusionary rule should not be invoked against allegedly pretextual stops. The pretext doctrine is primarily targeted against discriminatory stops. While the rare discriminatory stop deserves every condemnation, these stops will not be deterred by the application of the exclusionary rule because such stops are mainly meant to harass instead of obtaining evidence. As this Court will not apply the exclusionary rule when its deterrent purpose is not well served, the exclusionary rule should not apply to allegedly pretextual stops.

ARGUMENT

I. Petitioners' standard would unreasonably distort police regulations.

Reasonableness is the hallmark of the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . ." *Delaware* v. *Prouse*, 440 U. S. 648, 653-654 (1979) (footnote omitted).

Reasonableness is only the first part of the inquiry. The Fourth Amendment's reach is immense, covering such disparate and important topics as electronic surveillance, see *Katz* v. *United States*, 389 U. S. 347 (1967); searches of automobiles, see *Carroll* v. *United States*, 267 U. S. 132 (1925); stops and frisks, see *Terry* v. *Ohio*, 392 U. S. 1 (1968); administrative searches, *Camara* v. *Municipal Court*, 387 U. S. 523 (1967); school regulations, see *Vernonia School District 47J* v. *Acton*, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995); government employment conditions, see *National Treasury Employees Union* v. *Von Raab*, 489 U. S. 656 (1989); and sobriety checkpoints, see *Michigan Dep't of State Police* v. *Sitz*, 496 U. S. 444 (1990). Much of this law is formulated and enforced under the very costly exclusionary rule. See, *e.g.*, *United States* v. *Leon*, 468

U. S. 897, 907 (1984). Given the pervasiveness of the Fourth Amendment and the high cost its enforcement exacts, this Court must be very careful when determining what is reasonable.

A principle that helps this Court administer the Fourth Amendment with appropriate care is the need for objectivity.

This Court's Fourth Amendment jurisprudence prizes objectivity. The propriety of a search or seizure does not turn on the officer's motives. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott* v. *United States*, 436 U. S. 128, 137 (1978). Objectivity is essential because

> "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry*, *supra*, 392 U. S., at 21.

This inquiry makes finding an objective standard an imperative. See *id.*, at 21-22; see also *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964); *Henry* v. *United States*, 361 U. S. 98, 102-103 (1959).

Petitioners' proposed standard of "what a reasonable officer *would* do," see Pet. for Cert. 8-14; *United States* v. *Cannon*, 29 F. 3d 472, 475-476 (CA9 1994); *United States* v. *Guzman*, 864 F. 2d 1512, 1517 (CA10 1988); *United States* v. *Smith*, 799 F. 2d 704, 709 (CA11 1986), sacrifices the Fourth Amendment principles discussed above. It is an unreasonable standard cloaked in the language of the reasonable. The "would" standard's costs to society considerably outweigh any incidental benefit it accords individuals. This standard is dependent upon using police regulations to exclude evidence at criminal trials. This gives police regulations an impact much greater than intended. These important regulations will be changed or abandoned to avoid the disproportionately costly sanction of the exclusionary rule.

The objectivity purported by petitioners' standard is better achieved at a lower cost by the "could have" standard invoked

by the court below. See *United States* v. *Whren*, 53 F. 3d 371, 375 (D. C. Cir. 1995). This standard provides the courts with the necessary objectivity to review allegedly pretextual stops, while minimizing the costs of such review to the police and the society they serve.

A. Defining "Would."

The first problem with petitioners' proposal is determining what a reasonable officer *would* do. Under the could standard devised by the court below, a court simply looks to the officer's formal constitutional authority to conduct a stop. *United States* v. *Whren*, 53 F. 3d 371, 376 (D. C. Cir. 1995). An officer is authorized to stop automobiles when there is reasonable suspicion that the vehicle is being used to facilitate some crime, see *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975), or when the driver of the vehicle commits a traffic violation. See *Delaware* v. *Prouse*, 440 U. S. 648, 659 (1979). These limits are objective and well known to officers since they deal with the requirements of *Terry* v. *Ohio*, 392 U. S. 1 (1968) on a daily basis and are intimately familiar with the traffic laws.

Petitioners' narrower "would" standard attempts to further control officers' conduct in order to prevent allegedly pretextual searches. Because it attempts to predict conduct, what a reasonable officer "would" do, it is less certain than the "could" standard, which simply describes what can be done.

Petitioners' standard is also more intrusive. By narrowing the permissible course of conduct, the "would" standard is better described as a "should" standard, telling officers what they should do in a given situation. The nature of traffic stops makes this potentially dangerous advice to be giving to police. *Terry* stops involve "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ." *Terry*, 392 U. S., at 20. This precludes an officer from making any detailed, nuanced analysis before deciding to stop a vehicle. Therefore, courts must weigh evidence supporting a vehicular stop "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States* v. *Cortez*, 449 U. S. 411, 418 (1981).

Any attempt to predict what a reasonable officer would do must also be readily understood and applied by the officer in the field.

> "But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U. S. 200, 213-214 (1979).

These principles require more than simple reliance on a reasonable officer standard. While this Court does not attempt to reduce *Terry*'s reasonable suspicion standard " 'to a neat set of legal rules,' " *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983)), reasonable suspicion does have a unifying theme—"a suspicion that the particular individual being stopped is engaged in wrongdoing." *Cortez*, *supra*, 449 U. S., at 418. Petitioners' "would" standard runs counter to this principle. By focusing on what an officer *would* do instead of what *could* be done, petitioners' standard would exclude stops supported by reasonable suspicion. In order to minimize the confusion caused by this contradiction of *Terry*'s basic principle, cf. Butterfoss, Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine, 79 Ky. L. J. 1, 49 (1990-91) (officers won't understand why authorized but pretextual stop is wrong), some structure must be given to the "would" standard.

Petitioners' reliance on police rules and regulations to govern the "would" standard is an improvisation forged from necessity. *Terry* cannot be reduced to a set of concrete propositions, and this Court refuses to allow the courts to supervise the daily conduct of the police. See *Rizzo* v. *Goode*, 423 U. S. 362, 380-381 (1976). Therefore, the task of structuring petitioners' standard defaults to police regulations.

This fact is fatal to the "would" standard. Police regulations were never designed to justify excluding evidence in a criminal trial. Because they were not meant for the role intended by petitioners, police regulations cannot achieve the purpose sought by the "would" standard.

B. The Problems with Regulations.

1. Unintended consequences.

If accepted, petitioners' attempt to invoke police regulations to exclude evidence would provide a textbook example of the law of unintended consequences. Because police regulations are not meant to serve as evidentiary rules, using them for this purpose will have effects other than simply deterring police misconduct. These unintended effects override any potential benefit from backing police regulations with the force of the exclusionary rule.

Regulations promulgated by police departments are a relatively recent innovation. Historically, investigative practices were informal and rarely reduced to writing. This changed in the 1970s as departments began to promulgate their own rules. See LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 446 (1990).

These written directives "assist in setting goals, and they define policy, establish procedures, and set forth the rules and regulations of the organization. They are intended to guide the efforts and objectives of the department so that all activity is characterized by a singleness of purpose." O. Wilson & R. McLaren, Police Administration 136 (4th ed. 1977). Because they give a "singleness of purpose" to "all activity," police rules and regulations will govern a host of practices. Labor regulations; community regulations; efficient use of resources; compliance with health, safety, and environmental regulations; the relative importance of various crimes; crime-fighting tactics; and protecting citizens' rights are some of the areas that can be covered by police regulations.

Most police regulations are thus unlikely to be intended to protect private rights. The present case provides an excellent

example. Preventing undercover, plainclothes, and off-duty police from making traffic stops, see Pet. for Cert. 5, n. 3, does not protect the privacy of citizens.

What matters most to the citizen is the fact of being stopped, not whether the officer was in uniform or on duty. Efficiency is the most likely goal served by this regulation. It is inefficient for plainclothes or undercover officers, who are presumably investigating relatively serious crimes, to go after traffic offenders, except when there is an immediate threat to the public safety.

This regulation also has a safety component. Limiting traffic stops to uniformed personnel in marked vehicles prevents the person being stopped or third parties from believing that the unidentified officer is committing a crime against the stopped person, thus promoting officer safety. While the Fourth Amendment can regulate violence against private citizens perpetrated by police or their agents, *Tennessee* v. *Garner*, 471 U. S. 1, 7 (1985); cf. *Brower* v. *County of Inyo*, 489 U. S. 593, 597 (1989) (seizure occurs "only when there is a governmental termination of movement *through means intentionally applied*" (emphasis in original)), preventing overreaction on the part of third parties is not part of the privacy protected by the Fourth Amendment.

While the driver's anxiety is a legitimate Fourth Amendment interest, see *Delaware* v. *Prouse*, 440 U. S. 648, 657 (1979) (anxiety is part of the cost of being stopped), this does not imply that the D. C. police promulgated this regulation in order to protect Fourth Amendment interests. There is no constitutional right to be free of stops from undercover officers. Stops by uniformed officers have their own special infringements, such as the "possibly unsettling show of authority" that comes from a stop by a marked vehicle. See *ibid*. Undercover officers have the same authority to make stops as their uniformed compatriots. Thus *Terry* upheld a stop by a plainclothes officer. See *Terry* v. *Ohio*, 392 U. S. 1, 5 (1968). There is simply no substantial constitutional interest protected by the D. C. police regulation.

The fact that most police regulations are not meant to preserve privacy rights makes them particularly ill-suited to preserving citizens' privacy. Police regulations are closely

analogous to statutes. Both are formal rules enacted by some body; *regulations* coming from the executive, while *statutes* are derived from the legislature. See Black's Law Dictionary 1286, 1410 (6th ed. 1990). By allowing a criminal defendant to use the exclusionary rule to enforce a police regulation, petitioners' proposal effectively derives a private right of action from police regulations. See Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 796 (1994) (calling defendant invoking the exclusionary rule "a kind of private attorney general").

The law of torts permits a court to elevate statute to a private cause of action only when the "legislative provision protects a class of person by proscribing or requiring certain conducts" and "that remedy is appropriate in furtherance of the legislation and needed to assure the effectiveness of the provision . . . ." Restatement (Second) Torts § 874A. Most police regulations will fail this test. They were not designed to protect citizens' privacy.

Nor is the application of the exclusionary rule appropriate "in furtherance of the legislation . . . ." Police rules are designed to be enforced by disciplinary actions against the offending officer. See Wilson & McLaren, *supra*, at 138. There is no reason to believe that police rules are intended to penalize the rest of society simply because the department determines that one of its constables has blundered. See *People* v. *Defore*, 150 N. E. 585, 587 (N. Y. 1926).

Invoking the very costly exclusionary rule, see, *e.g.*, *Nix* v. *Williams*, 467 U. S. 431, 443 (1984); *United States* v. *Leon*, 468 U. S. 897, 907 (1984), to punish the violation of police rules is unfair to the agencies that make the rules. It warps police rules by giving them punishments far out of proportion to what the rulemaker intended.

This would have dire consequences for police rulemaking. Proportionality is central to any rational system of rulemaking. It damages society when the punishment exceeds the cost of the wrongdoing. Cf. Posner, Rethinking the Fourth Amendment, 1981 Sup. Ct. Rev. 49, 56-57 (noting the inefficiency of invoking the exclusionary rule for trivial infractions of the Fourth Amendment). Imposing disproportionately costly sanctions for police rules inevitably deters police rulemaking.

This conclusion is the driving force behind *United States* v. *Caceres*, 440 U. S. 741 (1979). *Caceres* dealt with the recording of a conversation by Internal Revenue Service agents. The recording conformed with Fourth Amendment standards, but violated IRS regulations. See *id.*, at 743-744. The relevant regulations required agents to get proper prior authorization from superiors before engaging in " 'consensual electronic surveillance' between taxpayers and IRS agents . . . ." *Id.*, at 744. Knowingly violating this regulation could lead to disciplinary action against the offending agent. See *id.*, at 756, n. 25.

This Court refused to supplement these regulations with the force of the exclusionary rule because it did not wish to punish the good intentions of the IRS.

> "Regulations governing the conduct of criminal investigations are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence in criminal trials. Although we do not suggest that a suppression order in this case would cause the IRS to abandon or modify its electronic surveillance regulations, *we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.*" *Id.*, at 755-756 (emphasis added; footnotes omitted).

The *Caceres* Court understood the inevitable and costly result of distorting the sanctions the agency determines are sufficient to enforce its rules.

> "Here, the Executive itself has provided for internal sanctions in cases of knowing violations of the electronic-surveillance regulations. To go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations. But since the content, and indeed the existence, of the regulations would remain within the Executive's sole authority, the result might well be fewer and less protective regulations. In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form." *Id.*, at 756 (footnote omitted).

The perverse effect of converting police regulations into constitutional rights can frustrate even the best-intentioned departments. Although courts may try to paint the clearest possible picture of what the Fourth Amendment requires, the reality that the police face everyday is much murkier. "Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise." *United States* v. *Cortez*, 449 U. S. 411, 417 (1981).

A prudent police department may decide to draw a line that falls short of the necessarily murky border between what is and is not permitted under *Terry*. By using its regulations to limit officers to clearly permissible stops, the prudent department would insulate itself from the exclusionary rule, and civil liability under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971) or 42 U. S. C. § 1983.

Adopting petitioner's standard would convert these safe harbors into the new constitutional standard. Since no standard can completely explain what is and is not permitted under *Terry*, the department will be confronted with a dilemma: it may either accept this newfound but unwanted ambiguity, or it may attempt to craft a new safe harbor that falls short of the new border.

Neither result is acceptable. Simply living with the new standard will force cautious departments to cope with unnecessarily high levels of Fourth Amendment violations, as officers now conduct themselves much closer to the constitutional line. Drawing another regulatory line is no better, since the new regulations will become the constitutional standard. Thus, any attempts to create a safe zone will be frustrated as the border between constitutional and unconstitutional continuously shifts towards police regulations. This ratcheting effect will not endear police departments to self-regulation.

> "In the several cities in which police have begun to spell out their policies, the procedure has been a matter of concern to city attorneys, whose job it is to defend the city in lawsuits. If a police agency makes itself increasingly subject to suit whenever it specifies its operating policies, city attorneys are likely to instruct the police to refrain from further policy-making." H. Goldstein, Policing a Free Society 123 (1977).

The reality of the dangers described in *Caceres* is found in prisoner rights cases. Beginning with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court examined prison regulations to determine whether the regulations created constitutionally protected liberty interests that the courts would protect from prison administrators. See *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 425-428, 115 S. Ct. 2293, 2297-2299 (1995). These cases developed into an examination of how much discretion state officials had to withdraw state-created benefits from prisoners: the more discretion, the less likely that the prisoner had a constitutional interest in the benefit. See *id.*, at 426-427, 115 S. Ct., at 2298. Thus in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 11-12 (1979), state standards for granting parole were subjective and vague, calling for a prediction of future behavior, rather than an examination of the prisoner's past. While the Court accepted without explanation "respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection," *id.*, at 12, the procedures used were deemed adequate. *Id.*, at 16.

Conversely, in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), the Board had " 'unfettered discretion' " to commute sentences, with "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied to the Board." *Id.*, at 466.

This Court began to recognize the consequences of such perverse incentives in *Hewitt* v. *Helms*, 459 U. S. 460 (1983). "It would be ironic to hold that when a State embarks on such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* parsed the language of the

relevant statute, and based on the choice of words found "that the State has created a protected liberty interest." *Id.*, at 472. After *Hewitt*, close examination of prison regulations for the extent of discretion given to prison officials became the norm. See *Conner*, *supra*, 132 L. Ed. 2d, at 428, 115 S. Ct., at 2299 (discussing *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) and *Kentucky Department of Corrections* v. *Thompson*, 490 U. S. 454 (1989)).

The irrationality of these cases was finally checked in *Conner*. "The approach embraced by *Hewitt* discourages this desirable development: states may avoid the creation of liberty interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Conner*, 132 L. Ed. 2d, at 429, 115 S. Ct., at 2299-2300. The perversity of such incentives helped justify *Conner*'s decision to abandon the methodology embodied in *Hewitt*. See *id.*, at 429, n. 5, 115 S. Ct., at 2300, n. 5.

Petitioners ask this Court to make the same mistake it avoided in *Caceres* and corrected in *Conner*. Agencies must not be punished for creating rules that may incidentally benefit individuals by transforming these rules into constitutional rights. Police rulemaking confers many benefits to society. See LaFave, Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 867-868 (1990); *Caceres*, *supra*, 440 U. S., at 755. Elevating these rules to constitutional rights can only reduce police incentives for rulemaking by punishing those with the most extensive rules.

2. Micromanagement.

A second problem with petitioners' demand to elevate police rules to constitutional rights is that it creates a high risk of judicial micromanagement of police rulemaking. Because petitioners' rule deals with *Terry* stops, it necessarily involves a multitude of factual situations that cannot be neatly covered by a handful of rules. See *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989). Yet many police forces may be unwilling to create the detailed set of rules necessary to encompass the universe of *Terry* stops. Excessive rules can eliminate individual initiative and reduce morale, making the personnel "look upon themselves as simply 'bodies' rather than as partners in the enterprise. Instead

of accepting responsibility and contributing worthwhile ideas, such employees simply perform as directed without particular regard to the success or failure of the organizational objectives." O. Wilson & R. McLaren, Police Administration 138 (4th ed. 1977).[2]

Even if departments wanted to involve themselves in the messy details of regulating *Terry* stops, the perverse incentives of elevating regulations to constitutional rights will deter many police agencies from keeping these areas regulated. See Part I B 1, *ante*; *United States* v. *Caceres*, 440 U. S. 741, 755-756 (1979). Therefore, if petitioners' argument is accepted, courts confronted with an allegedly pretextual stop risk finding a regulatory void as departments either refuse to regulate or cut back on regulations in fear of the exclusionary rule or civil liability.

Courts confronted with a lack of relevant regulations are left with two choices. First, they could simply uphold the stops so long as the stop was legally authorized. This is the "could" standard that petitioners wish to overturn. The only alternative is for the courts to fill the void and determine what a reasonable officer would do in a given situation.

This would be an unusually intrusive invasion of local prerogatives. Government is generally given "the widest latitude in the 'dispatch of its own internal affairs.' " *Sampson* v. *Murray*, 415 U. S. 61, 83 (1974) (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896 (1961)). Policing is a quintessentially executive function that is left primarily to the states and localities. It is thus particularly inappropriate for a court to invoke the federal Constitution in order to create a detailed code of police procedure. See *Rizzo* v. *Goode*, 423 U. S. 362, 380-381 (1976).

Such federally mandated rules would also be improperly homogenous. Different departments have different regulatory

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2. Any attempt to thoroughly regulate the patrol officer's duties runs a real risk of being too complicated. Thus one proposed set of model rules of police conduct runs, with commentary, to 289 pages. See K. Davis, Police Discretion 102 (1975). This can be a heavy burden to place on the already overburdened patrol officers.

needs. What is proper for police in New York City may not be right for Arlington, Bangor, Omaha, or Sacramento, or the Federal Bureau of Investigation or the Immigration and Naturalization Service. A single, federal rule is the antithesis of the local experimentation that is one of the most important components of federalism. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). Indeed, much of the force behind current police rulemaking came from local experimentation. See H. Goldstein, Policing a Free Society 117 (1976).

The prisoner rights cases, discussed *ante*, at 14-15, demonstrate that elevating regulations to constitutional rights leads to judicial micromanagement of executive functions. In addition to raising disincentives to prison regulation, the methodology of *Hewitt* v. *Helms*, 459 U. S. 460 (1983) was also too costly because it "has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefits to anyone. In so doing, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 429, 115 S. Ct. 2293-2299 (1995). *Terry* and its successors are no less deferential to the special needs of police. See *ante*, at 7.

Judicial micromanagement of police rules and *Terry* stops are no less intolerable than such micromanagement of our prisons. Although prison administration is a very formidable task, see *Hewitt*, 459 U. S., at 467, prisons at least offer the advantage of having controlled environments. Our streets and highways neither can nor should be subject to such control. They are also quite volatile. An officer who observes a violation that justifies a *Terry* stop should not have to worry about being second-guessed by the judiciary. In the real world of *Terry* there is not enough time.

II. The exclusionary rule should not apply to allegedly pretextual stops.

While petitioners' attack on their stop takes an objective tone, the reality of the attack is subjective. It is not the fact of the stop that their "reasonable officer" standard attacks, it is the officers' alleged motive for making the stop.

Delaware v. *Prouse*, 440 U. S. 648 (1979) noted the utility of vehicle stops in finding other incriminating information. "The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions licenses and registration papers are subject to inspection and drivers without them will be ascertained." *Id.*, at 659.

An officer's motive to gain evidence will not transform an otherwise valid act into a Fourth Amendment violation. In *Maryland* v. *Macon*, 472 U. S. 463 (1985), an undercover officer purchased two obscene magazines from an adult bookstore with marked money to facilitate an arrest and prosecution for selling obscene materials. See *id.*, at 465-466. The fact that the officer intended to recover the marked money did not transform the purchase into a warrantless seizure.

> "Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id.*, at 471.

As the stop may be invoked to try to gain incriminating information, an improper pretext must be based on darker motives.

The attack on allegedly pretextual stops is made because of the suspicion

> "that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, heavy jewelry, and flashy clothing." *United States* v. *Scopo*, 19 F. 3d 777, 786 (CA2 1994) (Newman, C. J., concurring). See also 1 W. LaFave, Search and Seizure § 1.4(e), 122 (3d ed. 1996); *United States* v. *Guzman*, 864 F. 2d 1512, 1516 (CA10 1988); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416 (1974); Pet. for Cert. 11.

Amicus neither denies the fact that a very small minority of stops might be made for these improper reasons, nor defends such discriminatory stops. Discrimination should be combated when it is found. The problem is that the exclusionary rule is the wrong tool to deal with this phenomenon.

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). It neither can nor is intended "to 'cure the invasion of the defendant's rights which he has already suffered.' " *United States* v. *Leon*, 468 U. S. 897, 906 (1984) (quoting *Stone* v. *Powell*, 428 U. S. 465, 540 (1976) (White, J., dissenting)).

Because it is no more than an extraconstitutional remedy, this Court takes a very pragmatic approach to applying the exclusionary rule. It weighs "the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence . . . ." *Leon*, 468 U. S., at 907. In practice this means weighing the deterrent effect of applying the rule against the high social cost of excluding relevant, credible evidence. See, *e.g.*, *Calandra*, 414 U. S., at 351; *Powell*, 428 U. S., at 488. Because of its uniformly high cost and remedial nature, "the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Arizona* v. *Evans*, 131 L. Ed. 2d 34, 44, 115 S. Ct. 1185, 1191 (1995). If "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted." *United States* v. *Janis*, 428 U. S. 433, 454 (1976).

Some misconduct, no matter how improper, cannot be deterred by the exclusion of evidence.

> "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." *Terry* v. *Ohio*, 392 U. S. 1, 14 (1968) (footnote omitted).

The truly improper pretextual stop is this type of activity that is immune to the threat of the exclusionary rule. "The rule simply does not reach police brutality and harassment . . . ." J. Miles, Decline of the Fourth Amendment: Time to Overrule *Mapp* v. *Ohio*, 27 Cath. U. L. Rev. 9, 78 (1977). As shown above, the movement against pretextual searches is aimed against largely discriminatory stops. Those rare officers who stop individuals in order to engage in this form of harassment simply will not be deterred by threat of excluding evidence. It is the harassment, not the search for evidence, that motivates these rogue officers.

Application of the exclusionary rule is one of the instances where the officer's motive is relevant to Fourth Amendment analysis. See *Scott* v. *United States*, 436 U. S. 128, 139, n. 13 (1978). Although this typically focuses on an officer's impeccably law-abiding motive, see *ibid.*, the Court will withdraw the sanction of exclusion when it will not deter dubiously motivated searches.

Thus in *Illinois* v. *Krull*, 480 U. S. 340 (1987), the possibility of legislative abuse did not prevent the Court from withdrawing the exclusionary rule from searches made in good-faith reliance on a statute that is later found to violate the Fourth Amendment.

> "It is possible, perhaps, that there are some legislators who, for political purposes, are possessed with a zeal to enact a particular unconstitutionally restrictive statute, and who will not be deterred by the fact that a court might later declare the law unconstitutional. But we doubt whether a legislator possessed with such fervor, and with such disregard for his oath to support the Constitution, would be significantly deterred by the possibility that the exclusionary rule would preclude the introduction of evidence in a certain number of prosecutions." *Id.*, at 352, n. 8.

The logic of the exclusionary rule cases is rigorous—if it does not deter, then the rule is not applied. "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Evans*, *supra*, 131 L. Ed. 2d, at 44, 115 S. Ct., at 1191. See also *Leon*, *supra*, 468 U. S., at 906; *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Since harassing officers will not be deterred by the exclusion of evidence, the rule should not apply. See *United States* v. *Janis*, 428 U. S. 433, 454 (1976) (do not apply the exclusionary rule if it would not lead to "appreciable deterrence"). There is no reason to compound the wrong of harassment with the wrong of exclusion that serves no purpose.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

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Respectfully submitted,

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